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IN THE

Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT AND WILLIAMSON LAND CO.,

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition accused the Government of asserting ownership of reclamation project water and using contracts with landowners to distribute that water in accordance with agency priorities rather than the principle of beneficial use established in the first Reclamation Act and repeatedly reaffirmed by Congress and this Court. Pet. 11. Rather than deny those charges, the Government has embraced them. It insists that it is not, in this Court's words, a "mere 'carrier and distributor'" of the water in the Columbia Basin Project, BIO 20 (quoting *Ickes v. Fox*, 300 U.S. 82, 95 (1937)), but rather "holds full legal title" to the waters it collects, BIO 17. As a consequence, the Government denies that landowners who put project water to beneficial use "inevitably obtain a permanent right to that water," even if they fully repay the Government their share of the construction costs of the project. BIO 13 n.6. Instead, the opportunity to obtain a permanent water right, to end payments for construction costs, and to obtain release from the Act's acreage limitations is a matter of bureaucratic grace – the Government will provide those benefits to some landowners by awarding them Section 9(d) contracts or Section 9(e) contracts with nominal terms of more than ten years, but may deny equal treatment to other similarly situated landowners through the simple expedient of limiting them to perpetually renewing ten-year Section 9(e) contracts.

Even worse, the Government also insists that it may use this power not only to deny landowners like petitioners the *benefits* of repayment contracts, but also to impose on them, as a matter of contract, all of

the *burdens* of repayment, including the Act's onerous acreage limitations, even if Congress chose not to impose those restrictions on petitioners under the terms of the statute. BIO 15-16.

The court of appeals' ratification of the Government's extravagant claims of authority, *see* Pet. App. 13a-15a, 25a-33a, is inconsistent with this Court's precedents, the text of the Reclamation Act, and the basic policies of reclamation law. At the same time, the Government's attempts to evade this Court's review of its overreaching are unconvincing. The principles at stake, and the consequences of leaving the decision below unreviewed, affect millions of acres of farmland throughout the West. This Court's intervention is required.

I. The Government Continues To Defy This Court's Reclamation Law Precedents.

1. This Court has repeatedly rejected the Government's claim that it owns Reclamation Act waters. *See* Pet. 12-19.[1] To be sure, the Act requires the Government to seek state approval of water appropriations before constructing a project. But "the Government's 'ownership' of the water rights [is] at most nominal; the beneficial interest in the rights confirmed to the Government reside[] in the owners

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[1] Contrary to the Government's assertion (BIO 16), petitioners repeatedly asserted below that the Government's position was incompatible with the Act's beneficial use provisions. *See* C.A. Appellants' Br. 21-22, 31; C.A. Reply Br. 9-13.

of the land within the Project to which these water rights bec[o]me appurtenant upon the application of Project water to the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983).

Thus, it is the application of water to the land for beneficial use – not a discretionary contracting decision of the Bureau of Reclamation – that governs the distribution of project waters. *See, e.g., California v. United States*, 438 U.S. 645, 673, 677-79 (1978) (applying the beneficial use standard to a post-1939 project). The Government's contracting authority is limited to setting the terms under which the farmers who obtain a water right through beneficial use will pay their fair share of the cost of constructing the project. *See, e.g., Fox v. Ickes*, 137 F.2d 30, 33 (D.C. Cir. 1943).

Here, petitioners have put project water to beneficial use for decades.[2] There is no claim that

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[2] The Government asserts that petitioners do not own "project land" because the Bureau classified the Black Sands area as "non-irrigable," BIO 5 n.3, but makes no claim that anything in this case turns on that assertion (which it never made below) Nonetheless, the claim is false: in previous litigation with petitioners, the Government asserted that petitioners' lands were within the project, C.A. J.A. 321-323, ¶ 3.23; the irrigation agreements the Bureau drafted and imposed on petitioners recite that their lands are within the project, C.A. J.A. 294, ¶ 7.a., 301, ¶ b(2); the Bureau's year 2000 official cost allocation lists the 40,323 acres irrigated by artificially stored groundwater (the water used by petitioners) as being "in the project," C.A. J.A. 347; and the Bureau has never provided the statutorily required notice of any intent to remove petitioners' land from the project, *see* 43 U.S.C. § 419.

their water is needed by other farmers with earlier beneficial use claims. To the contrary, the Government insists only that petitioners' water may, someday, be wanted by others to whom the Bureau has given a *contractual* priority. BIO 14.[3] But, as this Court has repeatedly recognized, Congress withheld from the Bureau the authority to prioritize among agricultural water users. Which farmers are entitled to how much water and in what priority is decided by the traditional western water law principles of beneficial use and prior appropriation. *See, e.g, California v. United States*, 438 U.S. at 665. And as a consequence, the most the Bureau could lawfully promise to any irrigation district was the amount of water its landowners actually put to beneficial use (subject to the Act's acreage limitations) prior to petitioners' appropriations.

2. The Government attempts to distinguish this Court's precedents in three ways, none of which is convincing. First, it states that "none of those cases involved groundwater," BIO 19-20, without any hint as to why that makes any legal difference.

Second, the Government claims that the Court rejected the United States' ownership claims in prior

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[3] The Government claims that petitioners' water "*could* be needed" by other project landowners "[s]hould the Bureau finish the Project." BIO 14 (emphasis added). But the remaining canals have been "unfinished" since the 1940s. BIO 3. Moreover, the Bureau holds water rights sufficient for future project uses as well as petitioners' project lands. *See* C.A. J.A. 682, ¶2; C.A. Appellants Br. 7; C.A. Reply Br. 16 & n.43.

cases not because the landowners had put the water to beneficial use, but because the Government had given the landowners a contractual right to the water. BIO 20. But one need only read the Court's opinions to discern that beneficial use was the basis of the decisions. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) ("The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use."); *Nevada v. United States*, 463 U.S. at 126 (explaining that "the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land").

Third, the Government argues that this case is different because Washington State gave the United States "full legal title" to the water, BIO 17, to distribute within the project without regard to beneficial use, BIO 16-19. That is both untrue and irrelevant. As this Court has observed, in "the state of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use." *Ickes*, 300 U.S. at 95; *see also Lawrence v. Southard*, 192 Wash. 287, 300 (1937) (same); *Neubert v. Yakima-Teiton Irrigation Dist.*, 117 Wash.2d 232, 237 (1991) (same).[4]

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[4] The regulations the Government cites (BIO 18-19) are not to the contrary. Instead, they simply require petitioners to comply with any *valid* conditions imposed in their contracts and

And, in any event, the Reclamation Act is perfectly clear that state law controls the distribution of project water only so long as it is consistent with the Act's beneficial use requirement. *See* 43 U.S.C. § 372; *California v. United States*, 438 U.S. at 668 n.21. Accordingly, Washington permitting officials had no authority to relieve the Bureau of its statutorily designated role as "simply a carrier and distributor of the water," *Ickes*, 300 U.S. at 95, or to displace beneficial use, in favor of bureaucratic contracting discretion, as "the basis" of reclamation water rights, 43 U.S.C. § 372.

II. Nothing In The 1939 Or 1956 Acts Made The Government Owner Of Project Water.

The Government nonetheless argues that Congress fundamentally changed reclamation law in 1939, when it authorized Section 9(e) contracts, and again in 1956, when it enacted specific protections for long-term Section 9(e) contracts. BIO 10-15. That is incorrect as well.

1. If Congress had intended such a monumental shift in western water policy, one would have expected it to say so clearly. Instead, Congress declared that the 1939 Act was simply intended to establish "a feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of construction charges," 43 U.S.C. § 485, not to eliminate repayment

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not to interfere with the delivery of water to which others have a *lawful* prior right.

of construction charges altogether for some landowners or repeal the beneficial use provision of the 1902 Act, 43 U.S.C. § 372.

Nor has the Government identified any compelling textual evidence of a radical shift in policy in 1939. It points to the fact that Section 9(e) does not require repayment of construction costs "*in full* over a preset period of years." BIO 10. But the statutory definition of "repayment contract" simply requires a contract "providing for payment" – not *full* payment – "of construction charges to the United States" without any reference to the time period during which repayment occurs. 43 U.S.C. § 485a(e).[5] Moreover, the statutory benefits petitioners claim require only that repayment be *accomplished*, and do not turn on how long repayment takes or whether the original contract established a "preset period." *See, e.g.*, 43 U.S.C. § 390mm (acreage and pricing limitations "shall not apply to lands . . . after the obligation . . . for the repayment of the construction costs . . . shall have been discharged"); 43 U.S.C. § 431 (providing for permanent water right when "all payments therefor are made" for equitably apportioned construction costs, 43 U.S.C. § 461).

Accordingly, under the 1939 Act, so long as landowners pay their share of operation and maintenance expenses and construction costs, they

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[5] The Government does not dispute that over time, petitioners will have paid their fair share of construction costs "in full" like any other project landowner (none of whom pays the full actual cost of construction). *See* Pet. 7.

are entitled to the benefits of repayment regardless of the form of their contract.

2. Likewise, nothing in the 1956 Act can be read to impliedly repeal longstanding law that entitled petitioners to obtain a water right through the beneficial use of project waters. Pet. 23-24. The amendments expressly reaffirmed that "beneficial use" continued to be the "basis, the measure, and the limit" of water rights under the Act. 43 U.S.C. § 485h-4. Thus, Congress hardly "acquiesced," BIO 11, in any Bureau attempt to use its Section 9(e) authority to arrogate to itself full title to project water and the right to determine its distribution. Rather, the amendments *restricted* agency discretion in response to the Bureau's misuse of its Section 9(e) powers. Pet. 25.

It is therefore unsurprising that even after the 1956 Act, this Court still viewed Section 9(e) contracts as simply another mechanism to recoup the costs of reclamation projects over time. *See Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 286 (1958) (referring to Section 9(e) contracts as providing for "[r]epayment, without interest" of construction costs for "water supply facilities").

The Government argues that by providing express protections for long-term Section 9(e) contracts, Section 485h-1 necessarily implies that short-term Section 9(e) contracts do not convey water rights or any other repayment entitlements. BIO 12-13. But that implication is hardly necessary – the statute elsewhere specifically contemplates a non-renewable ten-year "development period" during the construction of a project, which Congress likely had

in mind when it limited Section 485h-1 to contracts with terms of more than ten years. *See* 43 U.S.C. §§ 485f(b), 485h(d)(1). And in any case, any negative inference is insufficient to overcome the amendments' specific reaffirmation of the beneficial use principle. *Id.* § 485h-4. Instead, Congress's failure to address the rights of short-term Section 9(e) contract holders simply left those landowners in the same position they were in before the amendments. Any assumptions the 1956 Congress may have had about short-term 9(e) contracts were not enacted into law and therefore have no legal significance. Pet. 23-24.

3. Even if the Court were to conclude that the 1956 Act necessarily implied a limited exception from ordinary reclamation law principles for short-term Section 9(e) contracts, that exception should be narrowly construed to mitigate the conflict with the amendments' simultaneous reaffirmation of the beneficial use principle. Accepting the Government's construction of "long-term contract," on the other hand, would permit the exception to swallow the rule, allowing the Government to evade the restrictions of the 1956 Act by simply limiting landowners to perpetually renewing contracts with nominal ten-year terms. There would be no point in enacting Section 485h-1 if Congress intended to allow the Bureau discretion to circumvent the provision with the stroke of a pen.

Petitioners' construction, on the other hand, accords due respect to both the text of the statute and nearly 100 years of reclamation law: a contract has a term of more than ten years (and therefore is a "long-term contract" for purposes of Section 485h-1, *see* 43

U.S.C. § 485h-3), if the contract on its face permits continued enforcement for more than ten years and the contract has in fact persisted without significant alteration for more than a decade. *See* Pet. 27. This understanding accords with the statute's purposes – it withholds the benefits of Section 485h-1 from any Section 9(e) contract that lasts less than ten years, but if the contractual relationship persists beyond that, the Government must treat the landowner on par with others who have made similar long-term payments and investments in their lands in reliance on the availability of project water.

III. The Government's Misapprehension Of Its Authority, Ratified By The Federal Circuit, Warrants Review.

1. The Government argues that even if it has overstepped its authority, review is not warranted because short-term Section 9(e) contracts are relatively uncommon. BIO 21. *But cf.*, *e.g.*, *Ickes*, 300 U.S. at 87-88 (deciding question directly affecting only a single reclamation project). That argument misapprehends the scope of the Government's assertion of authority, the breadth of the decision below, and the consequences both have for landowners throughout the West.

The Government's assertion that it owns the water it distributes through Section 9(e) contracts is not limited to short-term contracts. *See* BIO 16-19. Likewise, the court of appeals' conclusion that Section 9(e) contracts are utility-type contracts with no repayment rights applies equally to short- and long-term contracts. Pet. App. 13a. As the amicus

brief of the San Louis and Delta-Mendota Water Authority, et al. explains, that holding threatens the status of many thousands of Section 9(e) contract farms in California and beyond. *See* Amicus Br. 10 (explaining that the court of appeals' decision "will raise uncertainty for all Section 9(e) contract holders in a way that can only exacerbate the economic and social distress currently plaguing California's Central Valley"); *see also Arizona v. California*, 460 U.S. 605, 620 (1983) (stressing importance of water rights certainty).

The Government implies that long-term contract holders need not worry because they are given significant rights under the 1956 amendments. BIO 21. But the most significant rights are available only upon "terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1); *see also id.* § 485h-1(2). And none is available if, upon expiration of a long-term Section 9(e) contract, the Bureau insists on offering the landowner the same renewing ten-year contract imposed upon petitioners. *Cf.*, *e.g.*, Northern California Water Rights Assoc., *Sacramento Valley Central Valley Project Water Service Contracts*, *available at* http://www.norcalwater.org/waterrights/cvp_contracts.shtml (noting that when certain long-term Section 9(e) contracts expired in 1995, the Bureau initially offered "a series of interim renewal contracts" with terms ranging "from 3 years to as little as 9 months, causing significant uncertainty and expense"). Likewise, until corrected, nothing prevents the Government, emboldened by the decision below, from limiting future reclamation project water users to the same kind of contracts

imposed on petitioners in this case in order to grant a preference to some landowners over others.

Nor does the Government deny that the decision below will have collateral consequences for changes in the use of project water (*see* Amicus Br. 17-18), the operation of the Takings Clause (Pet. 34), and application of statutes like the Endangered Species Act (*id.*).

2. The Government's final suggestion that the Court should stay its hand pending the development of a circuit conflict, BIO 33, is misplaced.

First, a conflict already exists over whether the Government can deprive landowners of a permanent right to beneficially used water through water utility contracts. *Compare* Pet. App. 13a-15a, 25a-33a *with Fox v. Ickes*, 137 F.2d at 33 ("The water-rights of appellants are not determined by contract but by beneficial use.") *and Lawrence*, 192 Wash. at 300 (same).

Second, the Government does not dispute that Reclamation Act questions arise in only a handful of western states. *See* Pet. 35; *see also* BIO 21 (asserting that the short-term contracts are rare outside Washington State); BIO 18 (arguing that, consistent with the decision below, the Ninth Circuit has already decided that the Bureau owns reclamation project waters). As a result, there is no point in waiting for the views of other circuits that likely will never have occasion to decide the questions presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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